IN THE

UNITED STATES SUPREME COURT

IN THE OCTOBER 1919 TERM

NUMBER 196 (26723).

THE NEW YORK CENTRAL RAILROAD COMPANY,

Petitioner,

vs.

WILBUR H. MOHNEY,

Respondent.

BRIEF OF RESPONDENT.

(Throughout this brief, Wilbur H. Mohney, respondent and plaintiff below, is denominated plaintiff, and The New York Central Railroad Company, petitioner and defendant below, is denominated defendant.)

I.

HISTORY.

This action was instituted by Wilbur H. Mohney as plaintiff, in the Common Pleas Court of Lucas County, Ohio, against The New York Central Railroad Company as defendant, for the recovery of damages resulting from personal injuries received by the said Mohney while a passenger on one of the said defendant's passenger trains which was wrecked at Amherst, Ohio, on the defendant's line of railroad between Toledo, Ohio, and Cleveland, Ohio.

At the April 1917 term of court, trial was had, a jury waived, and a finding was made in favor of Mohney, assessing his damages at $9,750.00, as per the stipulation of the parties filed in said court to the effect that if the Court found Mohney entitled to recover, his damages were in the amount of said sum.

Judgment was thereafter entered against the railroad in said Court, and proceedings in error were instituted in the Court of Appeals of Lucas County, Ohio, on the application of the railroad, which proceedings in error resulted in the affirmance of the judgment of the Court of Common Pleas.

Thereafter the railroad filed its motion in the Supreme Court of the State of Ohio to compel the Court of Appeals to certify its record to that Court. This motion was overruled.

Later the railroad filed its petition in error in the Supreme Court of Ohio, as of right, seeking the reversal of the judgments of the courts below. On the motion of Mohney this petition in error of the railroad in the Supreme Court of the State of Ohio was dismissed.

Thereupon the railroad filed its motion and petition for writ of *certiorari* in the Supreme Court of the United States, seeking the reversal of the judgments of the courts below.

II.

STATEMENT OF THE CASE.

This action originated in an Ohio Court, having been there instituted by Wilbur H. Mohney, a citizen and resident of Ohio, against The New York Central Railroad Company, a citizen of Ohio, to recover for personal injuries sustained by the said Mohney in Ohio, while riding as a passenger on one of said railroad's passenger trains in Ohio, and on transportation good only between division points wholly within Ohio, on defendant's line of railroad extending between said division points wholly and only within the boundaries of Ohio.

On March 29, 1916, Mohney was working for the defendant as locomotive fireman. By some rule of the company he had the rank of engine man, but he had not up to that time been assigned to an engine man's run. His work was altogether that of fireman.

(Petition, Record, page 3.
Answer, Record, page 5.
Stipulation, Rec., page 10.
Mohney's Testimony, Rec., pp. 13-14.)

At the time of his injuries, Mohney was riding as a passenger on transportation some time theretofore issued to him by the defendant company, an employee's annual card pass, known in this case as pass "D O 944"

and appearing in the Bill of Exceptions and record as Exhibit I.

(Petition, Rec., p. 3.
Answer, Rec., p. 6.
Stipulation, Rec., pp. 10-11.
Mohney's Testimony, Rec., pp. 11-12.)

This pass was issued to Mohney January 1, 1916, by the defendant company and was good between Air Line Junction (Toledo), Ohio, and Collinwood (Cleveland), Ohio, division points of The New York Central Railroad Company, between which points Mohney was employed to run and did run as fireman.

(Answer, Rec., p. 6.
Stipulation, Rec., p. 10.
Mohney's Testimony, Rec., pp. 13, 15.)

Mohney was issued his first pass six months after he first hired to the defendant. The engine dispatcher, when he handed him the pass said

> "He said they all received them when they had been in the service for six months."

After that, in successive years, at the first of each year, Mohney was issued a new pass, and was riding upon the last one which he ever received, at the time of his injuries.

(Mohney's Testimony, Rec., pp. 13, 15.)

This pass on which Mohney was riding read "from Air Line Junction, Ohio, to Collinwood, Ohio," and was good on certain trains between said points. These are the division points of The New York Central Railroad

comprising the Toledo-Cleveland Division, Air Line Junction being at Toledo, and Collinwood being at Cleveland.

(Citations supra.)

This transportation, card pass D O 944, contained a clause on the back purporting to exempt the railroad from liability for injuries or property damage received or sustained by one riding on such pass.

(Answer, Rec., p. 6.
Stipulation, Rec., pp. 10-11.)

On the night he was injured, Mohney took train No. 86 out of Toledo for Cleveland. This train ran in two sections. Mohney rode in the *first* section, the rear coach. The second section followed at some distance behind.

(Petition, Rec., pp. 3-4.
Answer, Rec., pp. 5-6.
Stipulation, Rec., p. 10.
Mohney's Testimony, Rec., p. 11.)

The first section of train No. 86, in the rear coach of which Mohney was riding, came to a stop at Amherst, Ohio, in the middle of the night. This was a point between Toledo, Ohio, and Cleveland, Ohio. The engineer of the *second* section following at some distance, disregarded the caution signal displayed by means of the defendant's block system of signals, eight thousand feet in the rear of the first section of train No. 86, disregarded a stop signal three thousand feet in the rear of the first section of train No. 86, and plunged on with his train,

crashing into the first section which was ahead of him, injuring Mohney.

(Petition, Rec., pp. 3-4.
Answer, Rec., pp. 5-6.
Stipulation, Rec., p. 10.
Stipulation of D. C. Moon, Gen. Man. of N. Y. C. R. R., Rec., p. 18.)

Mohney was asleep when the wreck occurred. He first woke up in the Elyria Hospital. His injuries were severe. His skull was fractured, nose broken, and so on. $9,750.00 is agreed upon as the damage.

(Petition, Rec., pp. 4-5.
Stipulation, Rec., p. 19.
Mohney's Testimony, Rec., p. 13.)

Some showing was made that Mohney was bound for "Pittsburgh" to attend his mother's funeral, but he did not know the date of funeral, or where the funeral was to take place, or where his mother was to be buried, nor was the funeral to be held in Pittsburgh.

(Mohney's Testimony, Rec., pp. 12-13, 15-16.)

What Mohney *actually* intended to do was to ride on his Ohio pass D O 944 from Toledo to Cleveland. He intended staying on that same train as far as Youngstown. From Cleveland to Youngstown, that train ran over the Erie Railroad, and wholly within Ohio. Mohney intended leaving that train at Youngstown, and there to call up his brother-in-law, the B. & O. agent at Option, Pennsylvania, on long distance to get the facts as to his mother's funeral. Mohney used to railroad out of

Youngstown on the Pea Vine, and had a number of friends in Youngstown whom he intended to look up while there. Besides, he intended to call at a different depot in Youngstown, between one-half mile and a mile distant from the depot where he had intended to get off his New York Central train, to see if a pass had been left there entitling him to ride from Youngstown into Pennsylvania.

(Mohney's Testimony, Rec., pp. 12-13, 15-16.)

Whether or not Mohney would have gone from Youngstown to Option, Pennsylvania, would of course have depended upon the information received by him from his brother-in-law on long distance. This will never be known for Mohney never got that far. He never even got to Cleveland.

(Mohney's Testimony, Rec., p. 13.)

That part of defendant's line of railroad running from Toledo (or Air Line Junction), to Cleveland (or Collinwood), is wholly within the State of Ohio. Likewise, that part of the Erie line running from Cleveland to Youngstown is wholly within the State of Ohio. Mohney had a pass with him, or at least one had been issued for him, entitling him to ride from Toledo to Youngstown by way of Cleveland and Ashtabula, likewise wholly within the State of Ohio, but he did not use that pass, preferring rather to take the short cut on the Erie from Cleveland to Youngstown, thus avoiding Ashtabula, and paying his fare on the Erie from Cleveland to Youngstown. The pass which he used was the Ohio

pass D O 944 reading "from Air Line Junction to Collinwood", both of which points are in Ohio.

(Stipulation, Rec., p. 10.
Mohney's Testimony, Rec., pp. 12, 16.)

Mohney's annual card pass on which he was riding when injured, was issued to him for a valuable consideration, namely, employment and acceptance of employment as one of the defendant railroad company's engine men assigned to the duties of fireman, and the lower courts so specially found.

(Entry and Finding of Common Pleas Court, Record, page 9.
Entry and Finding of Court of Appeals, Record, page 3.)

The defendant railroad, in disregarding caution, danger, and stop signals, and causing the rear end collision in which Mohney received his injuries, was guilty of "gross negligence" as specially found by the Common Pleas Court, and of "gross, wanton and willful negligence" as found by the Court of Appeals.

(Entry and Finding of Common Pleas Court, Record, page 9.
Entry and Finding of Court of Appeals, Record, page 3.)

Mohney was riding on a pass, good wholly and only between points on a line of railroad which, between said points, lay altogether and entirely within the State of Ohio. Had the wreck not occurred, and had Mohney proceeded on to Youngstown where for various reasons and purposes he intended to get off that train and to

then determine the further course and destination of his journey, he still would not have been at any time outside of the confines of the State of Ohio. On this Statement of Facts, the Common Pleas Court held that Mohney was on an intra state journey. The Court of Appeals held that he was on an inter state journey.

(Common Pleas Entry and Finding, Rec., p. 9.
Court of Appeals Entry and Finding, Rec., p. 2.)

III.

PROPOSITIONS.

1. The Federal Statute, known as the Hepburn Act, is enacted under the power of Congress to regulate interstate commerce. An employee's pass good only between Air Line Junction (Toledo) Ohio, and Collinwood, (Cleveland) Ohio, issued to the employee by the railroad on whose line he runs as locomotive fireman between said points all in said State, is not issued under the provisions of the Hepburn Law, but is transportation intrastate, and issued under the provisions of the Statutes of Ohio. Therefore the terms of any purported stipulation written on the back of said transportation between points within Ohio, in a cause of action arising within the State of Ohio, are construed and enforced under and according to the law of the State of Ohio.

2. Where an employee, a locomotive fireman of a railroad, was riding on one of his employer's passenger trains as a passenger, between Toledo, Ohio, and Cleveland, Ohio, upon transportation good only between Air Line Junction, (Toledo) Ohio, and Collinwood, (Cleveland) Ohio, issued to him by his employer entitling him to ride on its line running between said points wholly within the State of Ohio, and who was injured and compelled

to give up his journey owing to a collision of trains before he reached Cleveland, Ohio, but who had intended to pay his fare on that same train but on a different line from Cleveland, Ohio, running wholly within said state, to Youngstown, Ohio, at which latter point he intended to get off that train to visit with some friends, do some telephoning, and make inquiries on the basis of which he would *then* determine the further course and ultimate destination of his journey, the law of the forum, namely the law of Ohio, controls the construction and operation of the terms of the contract of transportation on which the said employee was riding at the time he was injured.

3. For the purpose of construing and giving effect to the terms of a contract of carriage entitling a passenger to ride on a railroad train from Toledo, Ohio, to Cleveland, Ohio, on a line of railroad running between said points wholly within the State of Ohio, the determination of the fact as to whether or not said passenger who boarded said train at Toledo, Ohio, was engaged in an intrastate or interstate journey, is immaterial and unnecessary, it being shown that said passenger's contract of carriage on which he was riding at the time of the happening of the event upon which his right of action is based, is good wholly and only between points wholly within the State of Ohio and was therefore not issued under or by virtue of any provisions of the Federal Law; such contract of carriage is construed and enforced in conformity with the Law of Ohio.

4. Where the highest court of the State of Ohio, in confromity with the law of said state, finds that an annual card pass is issued to a locomotive fireman as such, by his railroad employer, for a valuable consideration, namely his employment and acceptance of employment, that finding will not be disturbed where it appears that said annual card pass is one entitling said employee to ride on certain trains of said railroad between the division points from which the said employee runs as fireman and at one or the other of which division points the said fireman is required by his

employer to report for his work, it being shown that all of the said railroad's said line between said points lies within the State of Ohio; there is no Federal question involved in such finding of the State Court.

5. A railroad company which through one of its locomotive engineers causes a rear end collision between two of its fast passenger trains, which said collision occurs by reason of the fact that the said locomotive engineer, running a passenger train which is following another passenger train at some distance, disregards and fails to heed a caution signal eight thousand feet in the rear of the forward train and a stop signal three thousand feet in the rear of the forward train, which forward train had come to a stop, is guilty of gross, wanton, and willful negligence in so causing said collision.

6. Where a locomotive fireman of a railroad company is riding as a passenger on one of his employer's passenger trains upon transportation in the form of an annual card pass issued to said locomotive fireman entitling him to ride on the said line between points wholly within the State of Ohio, and the said passenger is injured in a rear end collision occurring on said Ohio line of railroad, between the train on which he is riding and another passenger train of his employer, which rear end collision occurs by reason of the fact that one of the locomotive engine men of the defendant company in charge of one of its said trains disregards and fails to heed caution, danger and stop signals, in an action brought by said locomotive fireman against his employer to recover for personal injuries received in said collision, the railroad company may not enforce a stipulation printed upon the back of said annual card pass, purporting to exempt it from liability arising through its negligence, it appearing that in so causing said collision, the railroad, so acting through its aforesaid locomotive engine man, was guilty of gross, wanton and willful negligence, and the highest court of the State of Ohio, in which State said action was originally instituted, so found.

IV.

ARGUMENT.

Hepburn Act Does Not Apply.

The Hepburn Act (34 U. S. Stat. at Large, p 584), so often referred to by counsel for the railroad in this case, is an act passed by Congress in the exercise of the Federal Power to regulate interstate commerce. By its very terms, in Section I of said Act, we find the following language:

> "* * * * the provisions of this act shall not apply to the transportation of passengers or property * * * * wholly within one State * * * *."

Of course, the act would contain such a provision. As a matter of law, the act would have no application except to interstate commerce, whether such limitation were contained in the act or not.

The Hepburn Act does not purport to regulate intrastate commerce, and if it were an act for the regulation of intrastate commerce, it would not be upheld by the Courts.

Now the Mohney pass on which he was riding when injured, D O 944, read "From Air Line Junction, Ohio, to Collinwood, Ohio." The Hepburn Act did not touch it at all. That pass was issued to Mohney neither under the Hepburn Act nor in spite of the Hepburn Act. The Hepburn Act had nothing to do with it.

Therefore, it is quite difficult to apply Federal Court holdings on interstate transportation to the case at bar. There are and have been many passes issued under the Hepburn Law, and possibly some issued in spite of the Hepburn Law, interstate passes, reading from a point in

one state to a point in another, but that is not the case at bar. The Mohney pass is intrastate, reading from a point in Ohio to a point in Ohio. It was not interstate and can not be interstate.

But counsel for the railroad says that when Mohney took that intrastate pass and entered upon an interstate journey, then his pass became interstate. There are two things the matter with this contention:

First. Mohney did not enter upon an interstate journey. His whole trip was to be broken up at Youngstown.

Second. Even had Mohney been on an interstate journey, by no act of his either in that or in any other connection, did he or could he alter the intrastate provisions of that pass.

Mohney on Intrastate Journey.

Mohney, while in Toledo, heard of the death of his mother. He determined to take the night train, No. 86, out of Toledo. His testimony on this question is quite clear. The Bill of Exceptions is short. Mohney says:

Q. How were you to get to Youngstown? A. On that train, over the Erie.

Q. Over the Erie Railroad? What particular car do you mean you were going from Toledo to Youngstown in? A. My understanding was, that car was going on through.

(Mohney's Testimony, Rec., p. 12.)

Then later on in his direct examination, Mohney's testimony is to the following effect:

Q. Had you had any notice as to where the funeral was to be held, at that time? A. Not a particle; I didn't know where it was going to be at that time.

Q. Who was your brother in law? A. His name is Weadock.

Q. Where did he live? A. Eight or nine miles south of Pittsburgh; Option is the Post Office, but I can't remember the name of the station.

Q. He is the B. & O. agent at that station? A. He is the B. & O. agent at that station, but I can't remember the name of the station.

Q. Where did your mother die? A. At that place.

Q. Where might she have been buried? A. Our old burying ground is up in Pennsylvania, where all the rest of them are buried.

Q. How far from that place? A. About a hundred and fifty miles north of Pittsburgh.

Q. Then there was also a grave yard near Option? A. Near Option, where they did finally bury her.

Q. Going back, then, what was your intention, or what plan had you made, at Youngstown? A. Well, to call him up there, and I had arrangements made there for a pass—

THE COURT:

Where did this injury occur; between Cleveland and Youngstown?

MR. MILLER:

Between Toledo and Cleveland; Amherst.

Q. What else were you to do at Youngstown? A. That train out of Pittsburgh. I found I could not make connection—it didn't leave there right—there are only two trains a day, a little jerk water road and only two trains a day stop at that place, about four o'clock; I found that out before I got there; so I imagined the way I would work it, I would loaf around there, if I got the pass, and visit with some of the fellows. I used to work in there on the Pea Vine, and I would rather hang around there where I knew some of them than hang around Pittsburgh three or four hours.

Q. And you would call up your brother in law from there? A. Call up my brother in law; that was my intentions.

Q. What fellows do you know at Youngstown? A. All those fellows that used to work on that branch that I used to work on, that I used to work with.

Q. Did you get to Youngstown ? A. Not quite.

Q. Did you get to Cleveland? A. Not yet.

(Mohney's Testimony, Rec., pp. 12-13.)

Then later on in his testimony in the beginning of his cross examination, Mohney again touches on this subject:

Q. Where was your mother's funeral to be, Mr. Mohney? A. I don't know a thing about it, any more than you do.

Q. You were on your way to attend her funeral? A. Yes, sir.

Q. Did you know when the funeral was to occur? A. No, sir; I didn't even know the day she died.

(Mohney's Testimony, Rec., p. 15.)

It is perfectly evident from the foregoing testimony that the only intention which Mohney had upon leaving Toledo was to go to Youngstown, and there to call up his brother in law on long distance and to find out the facts as to his mother's death, the place and time of her funeral, and where she was to be buried. From these facts, he intended then at *Youngstown* to determine the future course and destination of his journey. He was not a package of freight, bundled up and put on a train with no capacity for forming an intention or changing an intention when one had once been formed. He was a human being, bound for the City of Youngstown, Ohio, on a certain railroad car which he was going to ride on that far, and that far only. At Youngstown, he intended to get off his train, get the facts from his brother in law on long distance at Option, see some of his old railroad friends there, call at another depot one-half mile or a mile distant to see if any other passes had been left there

for him entitling him to ride into Pennsylvania, and to there and at that time make up his mind as to what he should do.

Of course, Mohney never got to Youngstown. We will never know what he would have done had he reached that point. All we know is that at Youngstown he intended to call up his brother in law, see some of his old pals and inquire about other transportation.

For all Mohney knew when he left Toledo, his mother might have already been buried. She might have been buried at the place of her death, near Option, where as a matter of fact she was actually buried as is shown by Mohney's testimony (Rec., p. 13), or she might have been already buried in the old burying ground one hundred and fifty miles north of there (Rec., p. 13), or her body might have been already shipped and on its way to Toledo for burial from Mohney's home. Mohney might have learned any one of a hundred different things upon calling up his brother in law from Youngstown. He did not know what the situation was, and because of this uncertainty, he determined to call up his brother in law from Youngstown and to find out what he should do and where he should go. His present intention was to go to Youngstown. His future intention was to be determined by what he learned upon reaching Youngstown.

Counsel for the railroad say that inasmuch as Mohney's mother was buried in Pennsylvania, therefore, Mohney would have obtained that information from his brother in law on long distance from Youngstown, and would have gone on into Pennsylvania, and that for that reason Mohney was on an interstate journey. That conclusion is not fair. It loses sight of Mohney's intention and does not take into account at all the fact that upon reaching Youngstown he himself was to learn the facts upon which to base his future course. We now know,

possibly quite definitely, just what information Mohney would have received on long distance at Youngstown, but Mohney did not know then when he was on that train at the time he was hurt. That was the reason he had no present intention of going beyond Youngstown.

To further militate against this argument, counsel cite an inadvertant reply which Mohney made to one of the questions asked of him in his testimony in which he said he was going to Pittsburgh:—

> Q. On that morning you were going to the City of Cleveland, were you? A. Yes, sir.
> Q. And were you going beyond the City of Cleveland? A. Yes, sir.
> Q. From the City of Cleveland, what other city were you bound for? A. Pittsburgh.
> (Mohney's Testimony, Rec., p. 12.)

We say this was an inadvertant reply of Mohney and truly it is so, for Pittsburgh was not his destination. His mother did not live there, neither did she die there. She was not buried there and there was no intention or suggestion of burying her there. True, had Mohney at Youngstown found that the funeral was to be held at Option, Mohney would have had to pass through Pittsburgh to get to Option. But he was not bound for Pittsburgh, and had no intention of passing through Pittsburgh unless the facts which he intended learning from his brother in law on long distance at Youngstown were to require that he should go through Pittsburgh.

Mohney's testimony is fairly susceptible of but one construction, and that is that his present intention was to terminate his trip at Youngstown, and at Youngstown to then determine his future journey, whether it should be on into Pennsylvania or back to Toledo to receive his mother's body.

Mohney Pass Intrastate, Regardless of Journey.

Although it is our contention that Mohney was on an intrastate journey, from Toledo to Youngstown, where his trip was to be broken up, yet we contend that even though the contention of counsel for the railroad be sustained, and it were to be found that Mohney was on an interstate journey, that finding would have no bearing or effect upon the ultimate result of this case.

What concerns the Court in this action, is whether the exempting clause on the back of that annual card pass D O 944 is to be enforced or not. That is the point in issue, and that exempting clause on pass D O 944 appears on the back of an intrastate contract of carriage. The Ohio Law might regulate the issuance of that pass and the enforcement of its conditions, for it is a State matter, a matter of intrastate commerce, but the Federal Law regulating interstate commerce, does not and can not reach the provisions of that intrastate pass so as to uphold such exempting clause, and for many, many reasons.

Let us assume for the moment that Mohney had determined to take a trip from Toledo to New York City, using that annual card pass D O 944 from Toledo to Cleveland, and paying his fare from Cleveland on to New York City. Such an act of Mohney would not bring that pass under the operation of the provisions of the Hepburn law, any more than were Mohney to scratch out "Toledo to Cleveland" on his pass, and write in "Toledo to New York City."

If Mohney should attempt to use that pass beyond Cleveland, he would find out mighty quick that it was not good beyond that point, and that it was merely an intrastate pass. He would not only get into serious trouble by attempting to alter its destination points, but also the courts would hold that by no act of his in attempting to

write in the names of different towns on that pass, could the intrastate character of that pass be altered.

It is a contract, which may not be materially altered by one of the parties thereto.

So now we have it that Mohney could not with his own pen, change the intrastate character of that pass. And we would submit that it is likewise true that by no act of Mohney, such as has been suggested in this case, could he or did he alter the intrastate character of that pass.

It cannot be logically contended that Mohney was on anything but an intrastate journey when he was traveling on transportation entitling him to ride only from Toledo, Ohio, to Cleveland, Ohio. One glance at the facts and decision in the case of *Ry. vs. State of Arizona,* recently decided by this Court on April 14, 1919, couches this contention in much better language than we are able to put it in. The pertinant propositions of the syllabus of that case are as follows:

> (Syl.) 1. "Whether a shipment was at a given time in interstate commerce is a question of fact.
>
> 2. "The mere intention of the owner of a carnival show equipment to continue his tour beyond the state did not convert a contemplated movement of the show between two points within the state into an interstate movement so as to preclude the state from requiring that the transportation service between such points be performed by a carrier and fixing the rate chargeable by the carrier for such service.
>
> (S. Pac. R. R. vs. Stat. Ariz. Case 238, U. S. Sup. Ct., decided April 14, 1919. Reported in Lawyers' Co-op. Advance Sheets for May 15, 1919, at page 384.)

To somewhat similar effect is the case of *White vs. St. Louis R. R.*, 86 S W. (Tex. Civ. App.) 962, in which case a passenger was carried by three separate railroads from a point in Illinois to a point in Texas. She had separate transportation in the form of passes issued by the respective companies. The last railroad company carried her between points within the state. Her baggage was checked through from the point of beginning in Illinois to the point of destination in Texas. *Held*, that the last railroad company was engaged in intrastate commerce, and that the State Statute expressly prohibiting it from limiting its liability as a common carrier applied and was controlling.

White vs. St. Louis S. W. Ry. Co., 86 S. W. (Tex. Civ. App.), 962.

"To constitute interstate commerce, it must be so in fact and not only in intention."

Judson on Interstate Commerce, page 15, paragraph 1.

In the case of *Luken vs. The L. S. & M. S. Railway Company*, 248 Ill., 377, the court declared the law as follows, beginning on page 383:—

"If the places from which and to which passengers are carried, and the line over which they are carried, are within the State, then the commerce is domestic and subject to state control. The transportation between points within a state by a railroad engaged in interstate traffic does not, of itself, determine the character of the traffic and make it interstate commerce. It is not the character of the road by which the property is transported, but the character of the traffic, that determines whether or not it is interstate or intrastate commerce."

Luken vs. The L. S. & M. S. Ry. Co., 248 Ill., 377, 383.

In *Gulf C. & S. S. F. R. Co. vs. Texas,* 204 U. S., 403; 51 L. Ed., 540 (1907), the court affirmed 97 Texas, 274, in holding that the regulations of the State Railroad Commission applied to a shipment from one Texas point to another, although the shipment originally was from a point in South Dakota. The intention of the owner to forward the shipment from its original terminal point to another point in the same state did not make the shipment between the two latter points an interstate shipment. (Citing many cases.)

To similar effect are:

New Jersey Fruit Exchange vs. Central Railway Company of New Jersey, 2 Int. Com. Rep., 84.

Missouri and Illinois Railroad Tie and and Lumber Company vs. Cape Girardeau and Southwestern R. Company, 1 I. C. R., 607.

1 I. C. C. R., 30.

Hope Colton Oil Co. vs. Texas & P. R. Co., 10 I. C. R., 696.

10 I. C. C. R., 696, 703.

St. L. H. & G. Co. vs. C. B. & Q. R. Co., 11 I. C. R., 82.

State Law Regulates State Transportation.

Now this is further true. As far as the Federal law is concerned, the railroad company could have issued that Toledo to Cleveland pass to Mohney for any old consideration it saw fit As far as the Federal law is concerned, that pass could have been issued to Mohney in consideration of his services as chauffeur to the family of the superintendant of the line at Toledo. Ohio might complain, but the United States—never. And suppose it had

been issued to Mohney in consideration of his services as chauffeur to the family of the railroad superintendant, and Mohney had used that pass on a trip to New York City, riding from Toledo to Cleveland on the pass, and from Cleveland to New York City by paying his fare. Would he therefore change the intrastate character of that pass? Could the Federal Government make complaint against the railroad for issuing such a pass, which under the provisions of the Hepburn Act was unauthorized in that it was not based upon published tariffs, and prosecute the railroad upon the ground that by using such a pass on an interstate journey, the provisions of that pass thereby and thereupon became subject to conformity with Federal law? Why certainly not! The railroad's complete exoneration would lie in the fact that such a pass was intrastate, reading from Toledo to Cleveland, and that by using it in riding from Toledo to Cleveland but on an interstate journey to New York City, the passenger had not thereby altered or changed in any manner the intrastate provisions of that pass. It was intrastate the day it was issued, and intrastate it remained. And when the Ohio Courts hold that the exempting clause on the back of that pass is inoperative and void, we contend that that holding should be sustained, for the reason that it is in conformity with Ohio Law in the construction and enforcement of an Ohio contract.

Under the decisions both State and Federal, it is Ohio law which determines the enforceability of the terms of that exempting clause.

Some jurisdictions hold that the law of the place where the contract is made, is the law which governs. If that be true, the Ohio law controls, because the contract of carriage was made in Ohio.

Other jurisdictions hold that the law of the place where the contract is acted upon, is the law which con-

trols. If that be true, Ohio Law controls, because the contract was acted upon in Ohio.

Other jurisdictions hold, among which is a notable case reported in the Federal Reporter, that the law of the place of the accident controls. If that be true, Ohio Law controls, for Mohney was hurt in Ohio.

The decision in the Federal Reporter of which we speak is that of *Smith vs. Railway,* which involved the validity of the exempting clause on the back of an interstate pass reading from Wellington, Kansas to Ferry, Oklahoma, a trip pass issued by a railroad to its brakeman employee. The first proposition of the syllabus of that case is as follows:

> (Syl.) 1. "Whether a waiver of liability for injuries, printed on the back of a pass delivered to an employee, was valid, so as to constitute a defense to an action for injuries resulting from the carrier's ordinary negligence, depended on the law of the place of the accident, and not on the law of the place where the pass was delivered, since the rule that a contract will be interpreted according to the law of the place of its execution and delivery, does not apply to actions of tort."
> (Smith vs. Railway, 194 Federal, 79.)

In that case, *Smith vs. Railway, supra,* the exempting clause was void under the law of Kansas, the state wherein the pass was delivered, but was enforceable under the law of Oklahoma, the state wherein the accident occurred. The Federal Court applied the law of Oklahoma and upheld the exempting clause on the back of the pass, upon the ground that the law of the place where the accident occurred is the law which controls, and speaking through Amidon, District Judge, on page 81, the Court says:

> "If that condition was void by the law of the state where the injury occurred, it would be disregarded. If it was valid, it would be enforced."
> (Smith vs. Railroad, 194 Federal, 79, 81.)

But we do not contend alone that this exempting clause on the back of Mohney's pass is unenforceable under the law of Ohio merely, but also unenforceable under the rules laid down by the courts of Federal Jurisdiction, the authorities of which courts we will now proceed to discuss.

Mohney Pass Issued for Value.

Counsel for the railroad insist that the question as to whether or not this Mohney pass is based upon a consideration is a matter of law. If it is a matter of law, then the Ohio Courts have already ruled upon this question in conformity with Ohio Law, which Courts have held that the pass in this case is based upon a valuable consideration; but whether this question is one of law or one of fact, or of mixed law and fact, it is and has been determined by the application of the principles of common sense.

Now what was back of that annual card pass which was issued to Mohney? What was it that impelled the railroad to issue such a pass to him, providing for his transportation to and from the divisions between which he ran as fireman? For that is what we are concerned in, certainly. What we want to know is what consideration moved in the issuance of that pass.

Now, was it friendship? No. Did the railroad all of a sudden take a liking to Mohney and determine to make him a present? Hardly. Did Mohney do the railroad any particular good turn at any time which would

form the basis for a gratuity? Nothing like that has ever been mentioned.

Why, Mohney's job required that in the performance of his duty he should report at Toledo at one time and at Cleveland another. The company took no particular fancy to Mohney. It would not have issued that pass to him unless he had hired out to it. The consideration moving from Mohney was his acceptance of employment. What kept the pass alive was his employment.

But the railroad says, this won't do at all, for the Hepburn Act does not provide for transportation in consideration of service, and if his pass is issued in consideration of Mohney's employment and acceptance of employment, why it is in violation of the Hepburn Act. Well, there are two things the matter with this contention: (a) this pass reads from Toledo to Cleveland and is not, was not, and never could be issued under the provisions of the Hepburn Law, and (b) even if this pass were interstate, which it is not, the mere fact that Federal Law might prohibit its issuance based as it is upon the consideration of employment and acceptance of employment, has no bearing at all in *this* case as to whether or not the Federal Law was followed.

In support of their contention counsel for the railroad cite *Railway vs. Thompson*, 234 U. S., 576, but the pass in the Thompson case was to the *wife* of an employee and read "from a point in Georgia to a point in South Carolina". In the Thompson case the railroad bore no relation of employer to Thompson's wife.

All Passes Are Not Free Passes

The Thompson case is good law, but when this Court rendered its decision in that case, it rendered that decis-

ion upon the facts which were before it, namely, upon a pass reading from a point in Georgia to a point in South Carolina, issued not to an employee, but to the wife of an employee. This Court did not mean to hold that *all* transportation must, under the Hepburn Act, issue either gratuitously or be based upon a money consideration evidenced by published tariffs.

This is borne out by the holdings of this Court on the subject of drovers' passes.

> (Syl.) "Under the doctrine established by *Railroad Company vs. Lockwood,* 17 Wall., 357, and many cases decided since, a person traveling by railroad as a caretaker of live stock on a 'free' or 'drover's' pass is a passenger for hire as to whom a stipulation that the carrier shall not be liable for personal injuries caused by its negligence is void.
>
> (Syl.) "As applied to caretakers of live stock, §1 of the Hepburn Act of June 29, 1906, uses the term 'Free pass' in the sense which established custom had given it and judicial determination had sanctioned long before the act, viz., as meaning not a gratuitous pass but one issued for a consideration constituting the caretaker a passenger for hire, within the doctrine of the Lockwood case. *Charleston & Western Carolina Ry. Co. vs. Thompson.* 234 U. S., 576, *distinguished.*
>
> (Syl.) "Where a connecting carrier, sued for personal injuries by a person traveling on a drover's pass, based its defense on a release of liability for negligence contained in the contract of carriage issued by, and in accordance with the tariffs of, the initial carrier, under the Carmack Amendment. *Held* that it was estopped from claiming also that under its own tariff the issuance of such passes was forbidden and unlawful and that therefore such traveler was unlawfully upon its train."
>
> Railroad vs. Chatman, 244 U. S., 276.

To similar effect are the following other Federal cases:

"A contract issued to a caretaker accompanying a live stock shipment, which provided that the charge for his transportation was included in the charge for the transportation of stock, is not a 'free pass' within the Hepburn Act (Act June 29, 1906, c. 3591, §1, 34 Stat. 586) as amended by Act June 18, 1910, c. 309, §7, 36 Stat. 546 (Comp. St. 1913, (8563-5), permitting a carrier to issue a free pass to such a caretaker, and a provision therein releasing the company from liability for injuries to the caretaker caused by the carrier's negligence is invalid."

Tripp vs. M. C. R. R. Co., 238 Fed., 449.

"Where defendant railway company, in an action for personal injuries to a passenger, failed to offer evidence showing freedom from negligence, and the jury found for the plaintiff, the verdict is conclusive on the question of defendant's negligence, since an injurious accident, when the passenger exercises due care, is *prima facie* evidence of negligence by the carrier."

"Plaintiff, in an action in damages for personal injuries against a railway company, was given his transportation as a caretaker for stock on a freight train. *Held*, that he was not a gratuitous passenger, prior to the Act of June 29, 1905, c. 3591, 34 Stat. 584, 585, since this fare was a part of the consideration paid for carrying the stock, nor under that chapter, as for carrying the stock, nor under that chapter, as originally enacted or as amended by Act April 13, 1908, c. 143, 35 Stat. 60, 61, and Act June 18, 1910, c. 309, 36 Stat. 546 (Comp. St. 1913, §8563), since by that statute caretakers of stock are expressly excepted."

Wiley vs. Grand Trunk Ry., 227 Fed., 127.

It is perfectly apparent therefore, that although a drover's pass is called a "free pass" in the Hepburn Act, yet it is not a free pass insofar as its being based upon no consideration is concerned. The Courts hold that although it is termed a "free pass", it is nevertheless based upon a consideration, namely, the consideration paid on the contract of carriage of live stock or poultry, as the case may be.

The same reasoning applies to the pass in the case at bar. It was not issued under the Hepburn Act and could not have been so issued as it read from Toledo to Cleveland. But if it had been issued under the Hepburn law, or in spite of the Hepburn law, the mere fact that the Hepburn Act terms it a "free pass", does not prevent its being issued for a consideration under the law.

The Hepburn Act (34 U. S. Stat. at large, page 584) insofar as it applies to this subject, is as follows:

> Sec. 5. "* * * no common carrier subject to the provisions of this Act shall * * * issue or give any interstate free ticket or free pass, or free transportation for passengers except to its employees and their families, its officers, agents * * *; to necessary caretakers of live stock, poultry and fruit * * *."

Counsel for the railroad would have us believe that if this Mohney pass comes under the Hepburn Act, it is a free pass because the law says that it is free. In applying that contention to the facts in the case at bar, counsel forget that laws are frequently violated. There is a maxim that all are presumed to know the law, but there is no maxim that all are presumed to obey the law.

We have statutes requiring that railroads equip with automatic couplers, yet in an action to recover against a railroad by reason of its failure to obey that law, the railroad may not defend upon the ground that inasmuch

as the law requires it to equip with automatic couplers, therefore it *did* equip with automatic couplers.

We have laws requiring locomotive smoke stacks to be equipped with certain kinds of screens so as to prevent the emission of sparks, yet in an action against a railroad to recover for fires negligently caused by it, which have been due to failure to properly screen their locomotive exhausts, no railroad may defend upon the ground that inasmuch as the statute required it to equip its engines with screens therefore it *did* equip them with screens.

If the issuance of this card pass DO 944 to Mohney based on the consideration of his employment and acceptance of employment, is against the Hepburn law, we cannot help it. We contend that it is not against that law, but if it is, this would not be the first instance that the Hepburn law had been violated.

Employment Was Back of Mohney Pass

Employment was back of that Mohney pass DO 944. No other consideration was back of it. No other consideration could have been back of it.

The case of *Doyle vs. Fitchburg Railroad Company*, 166 Mass., 492, strongly supports this contention. In that case it was held that

> "A ticket, given by a railroad to an employee who lives on a line of the railroad in a place other than the place of employment, entitling him to ride from one place to another as well as traveling solely for his own pleasure or business as when going to and from work, the rate of wages paid to him being the same as that paid for the same class of work to other employees who are not furnished with such ticket, forms part of that consideration by which he is induced to enter and continue in the

employ of the corporation, and is not a mere gratuity."

Doyle vs. Fitchburg R. R. Co., 166 Mass., 492.

See also:

Gill vs. Erie Ry. Co., 135 N. Y. Supp., 355. 151 App. Div., 131.

The following cases are of similar import:

Whitney vs. Railroad, 102 Fed., 850.

"Plaintiff, being in the employment of the defendant, a railroad company, changed to a different employment, still with defendant, and, in connection with the change, stipulated for free transportation to Boston from the city where he was to be employed, not in connection with his work, but for his own convenience. On one of these trips, made for his own purposes, and while not at work or going to or from his work, he was injured by the derailing of the car in which he was riding. He was traveling on a pass, similar to others which had been previously issued to him, stamped as an employe's pass, and containing on the back a waiver of all claims against the defendant arising from the negligence of its agents or otherwise. *Held*, that plaintiff was a passenger, and that an action to recover for the injury was governed by the rules applicable as between carrier and passenger, and not by those applicable as between master and servant, and the stipulations relieving the defendant from liability for negligence will not be enforced against the plaintiff although, he voluntarily assented to them."

Whitney vs. Railroad, 102 Fed., 850.

Dugan vs. Blue Hill Railway, 193 Mass., 431; 79 N. E., 748.

"In an action against the street railway company for personal injuries incurred by a motorman in the employ of defendant while being carried on a car of the defendant upon an errand of his own

after his day's work was done, it appeared that the plaintiff was traveling on a pass by the terms of which he assumed all risk of accident * * *. * * * In charging the jury, the judge ruled that * * * the plaintiff was a passenger for hire * * *. *Held*, * * * the defendant's exception to the ruling that the plaintiff was a passenger for hire must be overruled, as on the question of fact this court could not say that the judge came to the wrong conclusion * * *."

See also, Walther vs. So. Pac., 159 Cal., 769; 116 Pac., 51.

Eberts vs. Railroad, 151 Mich., 260.

Harris vs. Puget Sound Railroad, 52 Wash., 289; 100 Pac., 838.

(Syl.) 2. "The giving plaintiff a free pass did not alter the nature of the transaction. He was not estopped from showing that he was not to take his passage upon the terms therein expressed."

Ry. vs. Stevens, 95 U. S., 655.

(Syl.) 5. "Under evidence showing that a street car company regularly furnished its servants with passes to and from their work, it must be presumed that the pass given to decedent was given as a part of his wages, and not a free pass, hence a stipulation thereon exempting the company from liability for its negligence was void."

Ind. Tr. Co. vs. Isgrig, 181 Ind., 211.

Later on, the Court speaking through Mr. Justice Erwin in the opinion on page 216, has this to say:

"The employment of the conductor, the labor performed, the payment of wages, the issuing of the pass for transportation to and from his home are all an entirety, and as inseparable as the transaction in relation to the stock driver's pass. In our opinion, the appellee's decedent was not riding on a free pass."

Ind. Tr. Co. vs. Isgrig, 181 Ind., 211, 216.

(Syl.) "The rule that, where a pass is issued to an employee as one of the terms of his employment, the clause assuming the risk of accident is not binding, is not changed by St. 1913, c. 784, §18 as amended by St. 1914, c. 679, §2, prohibiting free transportation but permitting free or reduced rate service to employees, etc., and St. 1913, c. 784, §20, requiring filing of rate schedules."

Palmer vs. R. R., 116 N. E. (Supreme Judicial Court Mass.), 899.

Now as against the authorities cited by Mohney in support of his contention that the exempting clause on the back of that Ohio pass is inoperative, counsel for the railroad rely upon the Thompson case (*Railway vs. Thompson,* 234 U. S., 576), but the Thompson case is not in point:

In the Mohney case, Mohney is the employee and he it is who uses the transportation.

In the Thompson case, Thompson is the employee, but his *wife* it is who rides upon the transportation.

In the Mohney case, the Mohney transportation was intrastate, from Toledo, Ohio, to Cleveland, Ohio.

In the Thompson case, the transportation was interstate, from a point in Georgia to a point in South Carolina.

The Mohney pass being intrastate, was not and could not have been issued under any provision of Federal Law.

The Thompson pass being interstate was issued therefore under the Federal Law.

The Mohney pass was an anual card ticket entitling Mohney to transportation as an employee, himself.

The Thompson pass was a trip pass and was not to an employee.

Mohney is the one who used his annual card ticket.

Thompson's wife, to whom the railroad company did not bear the relation of employer, was the one who used the pass in that case.

Mohney counts on gross negligence and the facts proven bear him out.

The Thompson case does not involve anything except ordinary negligence.

The theory of the Supreme Court, in deciding the Thompson case, is that an interstate trip pass, reading from a point in one state to a point in another state, issued and used as Thompson's wife used that pass, is a gratuity *under the Hepburn Act,* not being issued to an employee himself. Whereupon the Court upholds the validity of the exempting clause on the back of that trip pass which Thompson's wife used.

But this is not the Mohney case at all. The high authority of the Thompson case is not subject to diversion at the hands of counsel for the railroad in the case at bar, so that that high authority stands sponsor for absolving the defendant railroad from liability for its gross negligence in causing the wreck which injured Mohney.

Mohney Entitled to Some Degree of Care.

Mohney was on that train, entitled to some rights, some degree of care, whether the highest degree of care or only slight care. He got no care at all. Absolutely nothing was done for his safety, and that which was done, was done with the most extreme kind of recklessness and wantonness.

A question somewhat similar to the one involved in this Mohney case came up before this Court in the case of *Railroad vs. Maucher,* decided January 7, 1919, and re-

ported in the Lawyer Co-op., U. S. Supreme Court Advance Opinions under date of February 1, 1919, which case involved the right of a circus employee to recover against a railroad for injuries received in a collision of trains between the circus train on which the plaintiff was riding and another train on the railroad's line. In his contract of employment the circus employee had agreed to release all railroad companies from any claims for injuries suffered while traveling with the circus on their lines. Suit was brought by Maucher in the State Court of Nebraska, to recover for injuries received by him while riding on the circus train, in which action Maucher was successful. In affirming the judgment rendered in the State Court of Nebraska, this Court, speaking through Mr. Justice Brandeis, has this to say:

> "Furthermore, plaintiff was not even a passenger on the railroad. His claim rests not upon a contract of carriage, but upon the general right of a human being not to be injured by the negligence of another."
>
> (Chicago, R. I. & Pac. Ry. vs. Maucher, decided Jan. 7, 1919, reported in Lawyers' Co-op., U. S. Sup. Court Adv. Ops. for Feb. 1, 1919, at page 122.)

On this same subject we would quote similar language of another court, in the case of *Railroad vs. Pitcock*, 82 Ark., 441, as follows:

> "They (railroads) can not buy immunity from liability for a failure to discharge it, by reduced fare or free transportation. * * * the question is one of public duty, which the state as *parens patriae*, having due regard for the lives and limbs of all her subjects, will not permit to be relegated to the domain of private contract. The interest which the commonwealth has in the comfort and safety of her citizens, to see that they are protected from injuries resulting through the negligence of

the public carrier or its servants, is the same, whether such citizen be a gratuitous passenger or a passenger for hire."

(Railway vs. Pitcock, 82 Ark., 441; 118 A. M. St. Rep., 84.)

Gross, Wanton, and Willful Negligence.

The accident in this case occurred by reason of the fact that the defendant's engine man in charge of the second section of train #86 "disregarded" the block signals. Now when we say disregarded, we mean exactly that same thing. He disregarded those block signals. It isn't our language. It is the language of D. C. Moon himself, the General Manager of The New York Central Railroad Company, with offices at Cleveland. It was Moon who published a statement relative to the cause of the accident, and in which statement Moon says that the accident was occasioned by reason of the fact that the engine man of the second section "disregarded" the signals.

Stipulation, Record, page 18.

General Manager Moon is a man of no mean intellectual attainments. He knows what the word "disregard" means. So does this Court. It means that that engineer failed to give heed to the caution, danger and stop signals that were set against him, contrary to the known and established rules of the company for care and safety, on which the very foundation stone of its existence rests. That engineer, unmindful of the rules of his company, without thought as to the lives of others, disregarding caution, danger and stop signals, plunged on with his train, ran down the motionless first section and ploughed clear through the rear coach in which Mohney was riding. Gross negligence. Not gross negligence? Who then *is* guilty of gross negligence!

Defense of Fog Abandoned Below.

The railroad makes a feeble effort in its argument before this Court, to attempt to show that when General Manager Moon says "disregarded" the signals, he had in mind that the signals were covered by a sheet of fog and that the engineer could not observe them. This defense is alleged in the answer of the defendant, 'tis true. One can find that defense by looking up the answer. It is alleged surely enough. But that defense is not only not sustained by the evidence, but it is not sustained by any evidence of any kind, of any sort, at any place, at any time. The railroad introduced not one minute scintilla of evidence on that subject, not a syllable, not even a letter of a word which related to fog or anything of the sort. The railroad knew what caused the accident. It got its information from Moon, the General Manager, and Moon knew that the engineer disregarded the signals.

Therefore, we would suggest that the railroad's argument built up on the supposed fact that the signals were covered by a fog, is entitled to no weight unless some evidence of some kind can be found in the record relating to that subject. And there is no such evidence.

Degree of Negligence for Court to Find.

Now Mohney in his petition charged "gross negligence", "gross negligence and carelessness", and the like, *pleading* in conformity with Ohio law, the facts upon which his conclusions were based. Under the law, the facts control. Mohney's conclusions as to what these facts amount to, are of no avail. It is and was for the Court to find whether the company was guilty of ordinary negligence, or such gross negligence as amounted to wanton and willful negligence. Mohney pleaded the facts,

the disregarding of the signals contrary to the known and established rules of the company, all when the offending engineer *knew that his actions would result in a collision and an injury to passengers.* The railroad had knowledge of these facts, through the petition, and the Court has stated what these facts have amounted to.

We submit therefore that we have not counted on one cause of action and taken judgment on another. We have pleaded the facts, and have taken judgment on those facts.

We come now then, to the question of the validity of the exempting clause on the back of that Mohney pass.

Exempting Clause Invalid in Ohio.

In Ohio, a stipulation such as appears on the back of that Mohney pass, exempting a railroad from liability, caused by the negligence of itself or its employees, when such contract is made and enforced within the State, is absolutely void.

This proposition is undisputed, and it would be an idle expenditure of time to set out at length all the cases in support thereof.

From a very strong recent Ohio Supreme Court case on this subject, we quote the following from the opinion by Mr. Justice Wanamaker on page 71 of the report:

> "Why should a court recognize in any person, artificial or natural, the right to do a wrong to some other person? How can it be said to be the right of one person, whether by contract or otherwise, to take the life or limb of another person wrongfully and negligently, and wholly without liability or responsibility for such wrongful and negligent act?
>
> If a contract between employer and employee, whereby the employee assumes all risks no matter how negligent the employer may be, must be

upheld by courts as a valid contract, the enormous increase in industrial casualties, the loss of life and limb that would suddenly and inevitably follow, would be almost inconceivable. We would have a veritable army of crippled unfortunates and maimed dependents, deprived of life's joys and blessings, filling our almshouses as paupers and charges upon the state's financial resources, entailing a burdensome system of taxation. Wholly apart from the higher humanitarian questions involved, the increased burden thus placed upon the state for charitable purposes would be, in and of itself, sufficient to affect contracts of this character with a vital public interest. Courts should not hesitate to hold such contracts wholly null and void.

Therefore, upon the general fundamental principles of public policy upon which the Ohio Constition and its laws are founded, as well as from the spirit of many of our constitutional principles, such a policy as is contained in the Pullman Company contract in the case at bar is clearly in conflict with the sound and humane policy of the state."

P. C. C. & St. L. Ry. Co. vs. Kinney, 95 O. S., 64, 71-72.

The syllabus of this case relating to this subject, is as follows:

(Syl.) 1. "Liberty of contract is not an absolute and unlimited right, but upon the contrary is always subservient to the public welfare.

(Syl.) 2. "The public welfare is safeguarded not only by constitutions, statutes and judicial decisions, but by sound and substantial publiv policies underlying all of them.

(Syl. 3. "A contract between an employer and employee, which nullifies or lessens any legal duty, that the employer owes to the employee relative to safeguarding the life, limb, safety, health or welfare of the latter, is contrary to public policy, and therefore, null and void. * * *"

Ry. vs. Kinney, 95 O. S., 64.

"It is well settled, in Ohio at least, that a common carrier cannot by any stipulation in his contract, or by any notice to the other party, exempt himself for negligence or default of himself or agent."

C. H. & D. Ry. vs. Pontius, 19 O. S., 221, 235.

See also:

R. R. Co. vs. Shepperd, 56 O. S., 68.
Ry. vs. Curran, 19 O. S., 1.
Knowlton vs. Ry., 19 O. S., 260, 263.

Exempting Clause Invalid in Other States.

"A clause in a railroad pass exempting the company from liability for injury to an employe to whom a pass is delivered in pursuance of a contract of employment is against public policy, and void."

Gill vs. Erie R. R. Co., 135 N. Y. Supp., 355.

But even in jurisdictions wherein such a contract is held valid, to exempt a carrier from liability for ordinary negligence, it is generally held that the carrier will not be relieved from liability for gross negligence, or for wantonness or for willfulness. The cases of some of these jurisdictions are typified by the following authorities:

(Syl.) 1. "A passenger traveling upon the cars of a railroad upon a free pass, on the back of which is endorsed a printed contract to the effect that the passenger assumes all risks of accidents * * * is deemed to have assented to the endorsement as a contract, by the act or using of said pass as a ticket, and is bound by its terms, properly construed and so far as they do not conflict with rules of public policy.

(Syl.) 3. "Such an agreement exempts the company from liability for damages resulting from

a slight or ordinary negligence of its servants, and leaves it liable only for gross negligence, willful misfeasance or act which have the character of recklessness. Settled rules of public policy forbid them to exempt themselves by contract from liability for these faults."

Ry. vs. Read, 37 Ill., 484.

(Syl.) 2. "A person riding upon a free pass may recover for personal injuries received through the gross negligence of the company.

(Syl.) 3. "Gross negligence is defined to be the want of slight diligence or care."

R. R. vs. O'Keefe, 63 Ill. App., 102.

To the same affect is,

Ry. vs. Beggs, 85 Ill., 80.

(Syl.) "Where a person traveling on a railroad receives from the company a free pass upon which is endorsed a statement that, 'it is agreed that the person accepting this ticket assumes all risk of personal injury * * *', such endorsement or agreement does not cast upon such person any risks arising from the gross negligence of the servants of the railroad company in running the train; * * *"

Ry. vs. Mundy, 21 Ind., 48.

To the same affect are,

Meuer vs. Ry., 5 S. D., 568.

Walther vs. Ry., 159 Calif., 769.

Turman vs. Ry., 86 S. E. (Supreme Court South Carolina), 655.

Annas vs. Ry., 67 Wisc., 46.

Ohio Law Controls.

Since Mohney was traveling on an intrastate pass which was issued to him in Ohio, used by him in Ohio, and while riding on which he was injured in Ohio, the Ohio law controls the construction, operation and enforcement of that contract of carriage.

The Hepburn Act does not control, nor does the Hepburn Act bring the Mohney contract within the operation of the Federal law, for by its very terms the Hepburn Act provides as follows:

> Sec. 1. "* * * the provisions of this Act shall not apply to the transportation of passengers * * * wholly within one state * * *". (Hepburn Act, 34 U. S. Statute at large, 584).

It follows therefore, that inasmuch as the terms of the transportation agreement depend upon local law, this exempting clause must stand or fall with the Ohio decisions.

And in this connection it is not necessary to go into the question as to whether the law of the place where the contract is made, is the law which controls, or whether the law of the place of the accident is the law which controls. In the case at bar, the contract was made in Ohio, and Mohney was hurt in Ohio.

In passing however, we will quote the syllabus in *Smith vs. Railway,* 194 Fed., 79, in which action there was involved the validity of the exempting clause on the back of an interstate employee's pass reading from Wilmington, Kansas, to Ferry, Oklahoma. It appeared that such exempting clauses were invalid under the law of the State of Kansas, wherein the contract of carriage was made, but were valid in the State of Oklahoma, wherein the employee was injured. The pass was a trip pass.

The following is the language:

> (Syl.) 1. "Whether a waiver of liability for injuries, printed on the back of a pass delivered to an employee, was valid, so as to constitute a defense to an action for injuries resulting from the carrier's ordinary negligence, depended on the law of the place of the accident, and not on the law of the place where the pass was delivered, since the rule that a contract will be interpreted according to the law of the place of its execution and delivery does not apply to actions of tort."

Then later on, at page 81, the Court, speaking through District Judge Amidon, has this to say:

> "If that condition was void by the law of the State where the injury occurred, it would be disregarded. If it was valid, it would be enforced."
>
> Smith vs. Railway, 194 Fed., 79, 81.

The Ohio Supreme Court follows the rule that the validity of the exempting clause must be determined by the laws of the State wherein the contract is made and to be executed.

> Knowlton vs. Ry., 19 O. S., 260.
>
> Ry. vs. Shepperd, 56 O. S., 68.

See also,

> Hughes vs. Penn. R. R., 202 Pa., 222, likewise reported in 63 L. R. A., 513, wherein appear extensive notes and annotations on page 527 (63 L. R. A.).

Exempting Clause Invalid in Federal Courts.

In the case of *Southern Pacific Company vs. Schuyler*, 227 U. S., 601; 57 Law Ed., 662, in which the plaintiff was riding gratuitously from one state to another, while off duty, the Court held as follows:

(Syl.) "An employee in the railway mail service who, in good faith and with the consent of the carrier, accepts when off duty a free passage in interstate transportation, does not forfeit his right to the benefit of the rule of the local law, which charges a carrier with the duty to exercise care for the safety of a gratuitous passenger because his gratuitous carriage may have been forbidden by the Hepburn Act of June 29, 1906 * * *."

On pages 612 and 613, the Court admirably states the law:

"Neither the letter nor the spirit of the act (Hepburn) makes an outlaw of him who violates its prohibition by either giving or accepting gratuitous interstate carriage. The deceased no more forfeited his life, limb or safety and no more forfeited his right to the protection accorded by the local law to a passenger in his situation, than the carrier forfeited its right of property in the mail car upon which the deceased rode. His right to safe carriage was not derived, according to the law of Utah, from the contract made between him and the carrier, and therefore was not deduced from the supposed violation of the Hepburn Act. It arose from the fact that he was a human being of whose safety the plaintiff in error had undertaken the charge. With its consent he had placed his life in its keeping and the local law thereupon imposed a duty upon the carrier, irrespective of the contract of carriage.

"The Hepburn Act does not deprive one who accepts gratuitous carriage, under such circumstances, of the benefit and protection of the law of the state in this regard."

So. Pac. Ry. vs. Schuyler, 227 U. S., 601, 612-613 (57 Law Ed., 662).

(Syl.) 1. "Whether the highest state court should apply the law of the place of contract to a controversy respecting the right of a common carrier to limit its liability for negligence to the agreed valuation, is not a Federal question which

will sustain the jurisdiction of the Supreme Court of the United States over a writ of error to the state court.

(Syl.) 2. "The highest court of the State may administer the common law according to its own understanding and interpretation, without liability to a review in the Federal Supreme Court, unless some right, title, immunity, or privilege, the creation of the Federal power, has been arrested and denied.

(Syl.) 4. "No unlawful regulation of interstate commerce is made by the refusal of a state court to limit the liability of a common carrier for its negligence in the execution of a contract for interstate carriage to the valuation agreed upon, in the absence of congressional action providing a different measure of liability."

Pennsylvania R. R. Co. vs. Hughes, 191 U. S., 477; 48 L. Ed., 268; 24 Supreme Ct. Rep., 132.

"Where live stock is carried under a contract, and plaintiff accompanies it as caretaker, the law of the state in which the contract was made governs the right of a carrier to limit its liability to him, in the absence of Federal law on the subject, regardless of whether the shipment is interstate or not, since the contract is a single one, and the performance a continuous act."

Wiley vs. Grand Trunk Ry., 227 Fed., 127.

V.

CONCLUSION.

We beg leave therefore to suggest to the Court that the judgments of the Courts of Ohio, holding invalid the exempting clause on the back of the Mohney card pass D O 944, should not be disturbed, the Mohney pass being obviously an Ohio contract of carriage reading from

Toledo, Ohio, to Cleveland, Ohio, it having been used by Mohney in Ohio on an Ohio Railroad, and Mohney at the time of so using the pass having been injured in Ohio.

All of which is

Respectfully submitted,

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